

MARITIME LIENS AND SHIP MORTGAGES IN THE PHILIPPINES

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Abstract

The problem in the Philippines is that most vessels are old and outdated which affects the seaworthiness thereof. The reason for this is the reluctance of the banking and financing institutions to provide financial assistance for vessel acquisition and repairs, and one of the reasons for this reluctance is the nature of the national provisions related to maritime liens and mortgage in the country.

The objective is to have a favourable financing climate for the development of the Philippine merchant fleets by improving the said system and making it uniform, or at least as close as possible to international practice so as to make it more understandable to the international shipping and financing community.

This is achieved by analyzing the Philippine's system with the 1993 Convention on Maritime Liens and Mortgages which likewise has the same objective, and also by comparing the system in the Philippines to that of Australia.

Through this study, we can see how the current system in the Philippines could be improved, allowing the State to restructure its law in order to meet the desired objectives.

Study were made on the 1993 Convention's provisions relating to mortgages, the recognition and enforcement of mortgages, hypothèques, and charges, its ranking and effects, registration and change of ownership in mortgages. With respect to maritime liens, its characteristics, the maritime liens recognized and excluded, its priorities, extinction by lapse of time, other maritime liens allowed to be created at the domestic level, and its transferability. Also, the provisions under the Convention relating to notices and effects of forced sale, rights of retention, the temporary change of flag and its lack of protection to innocent purchaser on a voluntary sale. Comparisons were made also between Philippines law and Australian law with respect to the nature, system and characteristics of maritime liens, the property to which maritime liens attaches, its transferability, the maritime liens recognized, its approach on the priorities and the conflicts of law.

Based on the foregoing, the paper came up with the conclusion that most provisions of the Convention are favourable and in line with the objectives but have some imperfections, Philippines should therefore not ratify but only to amend its current law similar to that of the Convention.

WORKING TITLE:

Maritime Liens and Ship Mortgages in the Philippines

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Acronyms

IMO	International Maritime Organization
UNCTAD	United Nations on Trade and Development
ILO	International Labour Organization
LOSC	Law of the Sea Convention
UN	United Nations
MLC	Maritime Labour Convention
CMI	Comite Maritime International
ITF	International Transport-group Federation

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Introduction

The Shipping Industry is one devoted to the transport goods and passengers by water. It plays a very big economic role as over 90% of world trade is carried by the international shipping industry.¹ The importance of this role also holds true at the domestic level especially in countries such as the Philippines which are archipelagic States. Without shipping, the import/export and trade within the country of affordable food and goods would not be possible - half the world would starve and the other half would freeze. Because of the physical risk of shipping attributable to the harsh nature of the seas, internationally the industry is regulated by the International Maritime Organization (IMO). IMO is a specialized agency of the United Nations (UN) which promotes safety and at the same time protection of the ocean's environment from pollution caused by shipping. Financing has always been cited as a problem to some developing countries in the development of national fleets because of the high cost of vessel acquisition and repairs. It is a big factor which affects seaworthiness of a vessels for instance the move to phase out single hulled tankers, to be replaced by double hulled tankers so as to prevent oil pollution from vessels that might encounter accidents. Acquisition of such vessels is very expensive and that is why improving financial conditions is a necessary element in the pursuit of the implementation of the United Nation's Convention on the Law of the Sea (UNCLOS) and the IMO instruments as they relate to navigational safety and environmental protection.

One of the reason for the reluctance of some financial or banking institutions to provide loans is the nature of maritime liens. Maritime Liens are claims which are usually privilege claims which ranked ahead of the mortgagees claim in the priority of payment during the distribution of proceeds in case of a forced sale of the vessel. As such it may substantially affect the mortgagees claim to fully recover the loan extended. Maritime liens are however necessary, although competing claims from different sectors sometimes cause difficulty for the legislature and courts in the determination of the priority and giving claims a status of maritime lien.² The law on the maritime liens and ship mortgages is the backbone of the maritime industry and it is the intention of this paper to revisit and examine said law and how the Philippine's law on the subject may be improved taking into account international practice. Such improvements should make the Philippine system more understandable for foreign entities and foster favourable financing climate consistent with the objectives of the International Convention on Maritime Liens and Ship Mortgages. The present paper will thus analyze the

¹ Shipping Facts at <http://www.marisec.org/shippingfacts/>

² These sectors, among others, include the salvage operators, seamen for their wages, ship operators for claims on general salvage, necessariesmen or repairmen, government for the protection of third parties claims arising from tort and others such as port, waterway and pilotage claims

Convention and compare the Philippine law on the subject matter to that of Australia, the latter giving high priority and affording more protection to mortgage creditors. It should be noted that the a distinguishing feature of the British law in this regard is that it affords even more protection compared to that of the Convention; this in total contrast to the United States of America whose approach has been adopted by the Philippines. With this paper, it allows the Philippines to restructure its laws on maritime liens and ship mortgages in a manner which is favourable and consistent with the objective of promoting the proper management and safe operation of the maritime industry.

1 1993 Convention on Maritime Liens and Ship Mortgages

1.1 Introduction

The international community attempted to unify and solve the priorities on the maritime liens which led to the adoption of the 1926 and the 1967 Convention on Maritime Liens and Mortgages. The 1926 Convention was adopted at Brussels, April 10, 1926 and was successful but became obsolete. Because of this, the need for another convention arose which led to the adoption of the 1967 Convention likewise held at Brussel's, May 27, 1967. This Convention however never entered into force as it did not obtained international support and acceptance.

After the 1926 and 1967 Conventions, the United Nations Trade and Development (UNCTAD) and International Maritime Organization (IMO) sponsored another attempt to unify the laws on the subject matter leading to the creation of the 1993 Convention which was adopted by consensus by a conference of Plenipotentiaries of 65 states. The Comite Maritime International (CMI), an international non-governmental organization whose objective is to contribute by all appropriate means to the unification of maritime law in all its aspects,³ presented a draft revision of the 1967 Convention on Maritime Liens and Mortgages during the 1985 CMI conference in Lisbon, and it agreed therein that the primary purpose of a convention should be that of improving the security level of mortgages and hypotheques. In particular, it agreed that:

1. long term financing is essential for the development of merchant marine;
2. the more readily available the less expensive security is the vessel itself, that is the possibility that no other securities are required such as real properties;
3. the need for uniform rules increasing, for ship financing is becoming more and more international; and
4. the essentials features of a satisfactory security are i) the possibility of enforcement wherever the vessel maybe found, and to this effect the security must be recognized in as many countries as possible through an international convention, ii) the possibility of a sale of the vessel at the market price, and to this effect it is necessary to offer the prospective buyer a valid title wherever the ship may go after the forced sale; iii) the possibility of recovering the outstanding portion of the loan

³ <http://www.comitemaritime.org/home.htm>

from the proceeds of the forced sale, and to this effect the claim of the lender must be granted the highest possible priority⁴

It took eight years of preparation from 1985 before a diplomatic conference was convened in Geneva between 19 April and 7 May , 1993, and the Lisbon draft was used as one of the major reference in the preparation of the 1993 Convention by the Joint Intergovernmental Group of Experts (JIGE) established by IMO and UNCTAD. The objectives therein in substance are reflected in the preamble of the Convention which is also partly in line with the objectives of this paper as outlined in the introduction. In this first chapter, provisions of the Convention on the subject will be examined so as to determine whether or not it is advisable for the Philippines to ratify it and if not, how some of its sound provisions will help in improving the Philippine’s law on the said subject matter if adopted.

The 1993 Convention went into force on 5 September 2004, and currently has 11 signatories and 12 States parties.⁵

1.2 Provisions Relating to Mortgage

1.2.1 Recognition and Enforcement of Mortgages, “hypotheques” and charges

Under Article 1 of the Convention provides to the effect that mortgages, “hypotheques” and registrable charges of the same nature effected on seagoing vessels shall be recognized and enforceable in State Parties. Similarly to the Lisbon Draft, basically three requirements must be satisfied before said mortgages, hypotheques and other charge will be recognized and enforceable. These are:

1. That Mortgages, hypotheques and charges shall be governed by the laws of the State where said charges are registered;
2. That instruments deposited with the Registrar shall be open to public inspection instead of just those who have legitimate interest to secure such information only, and
3. To specify the names and addresses of the person in whose favour the mortgagee, “hypotheque” or charge has been effected or that it has been issued to its bearer, the maximum amount

⁴ See: Francesco Berligieri, *Lloyd’s Maritime Commerce and Commercial Law Quarterly* 1995 p 57-58.

⁵ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 49 (A/46/49), p 156. See Appendix 1 for complete list of the State Parties and Signatories.

secured, if it is a requirement of the law of the state of registration, and the date and other particulars which according to the law of the State of registration determine the ranking in relation to the other registered mortgages, “hypotheques” and charges.⁶

The above provisions achieves the Convention’s objective of making the state parties recognize foreign mortgages and making them enforceable in their respective States, one of the essential features of satisfactory security. This is applicable to those States which still do not recognize foreign mortgages and charges. Indonesia for instance doesn’t recognize foreign mortgages and charges until just recently when it ratified the Convention, the purpose of which was to encourage creditors for ship procurement as well.⁷ Another example can be found in States who adopt the traditional common law legal system in which legislative intervention is absent. For example is New Zealand in the case *The Betty Ott V General Bills Ltd.*⁸, where the New Zealand Court of Appeals invoking the *Halcyon Isle* refused to recognize a ship mortgage registered in Australia even if Australian Law on Ship Mortgage is very similar to that of New Zealand. The result of this decision lead to the subordination of the mortgage claim to that of an equitable charge, which clearly is detrimental to the mortgage creditor. This however was corrected by the New Zealand Parliament when it enacted the Ship Mortgage Act of 1992 providing to the effect the recognition of foreign instruments on securities, charges on ships, and at the same time giving the said instruments or charges the same priority as that of New Zealand ship mortgages.⁹ The requirement of registration under the Convention therefore excludes equitable mortgage, one constituted without registration recognized by States which traditionally apply the common law system. In the Philippines, however the law is already in line with the Convention as it only recognizes foreign mortgages, hypotheques and other charges provided that they are registered in accordance with the law of the State of registration expressly stated in the Ship Mortgage Decree of 1978.¹⁰ Within the Philippines, equitable mortgage may however be recognized. There are two schools of thought. One is, unlike real property mortgage, chattel mortgage must be registered to be valid as between the parties because Article 2140 of the Philippine Civil Code states that “By Chattel Mortgage, personal property is recorded in the Chattel Mortgage Register as a security for the performance of an obligation.” From the wordings of the said provision, registration seems necessary if the provision is to be considered as a definition. But another school of thought proposes that

⁶ See: Art. 1 (a,b,c) 1993 Convention.

⁷ See: Indonesian Commercial Letter, July 2005; Ratification signed on July 8, 2005; See also: Suharnoko Ship Mortgage and Vessel Arrest Laws in Asia : Convergence Versus Divergence?, US-China Law Review, ISSN 1548-6605, USA Jun. 2006, Volum2e 3, NO. 6 (Serial no . 19) p 42.

⁸ [1992] 1 N.Z. L.R.655 (NZ C.A).

⁹ The New Zealand Ship Registration Act 1992, Sec. 70.

¹⁰ Ship Mortgage Decree of 1978.

registration is not necessary because sec. 4 of the Chattel Mortgage Law states that the registration is only for the effectivity against third persons and there is nothing inconsistent with Sec. 4 and Article 2140 of the Civil Code. In Thailand, during the passage of Vessel Mortgage and Maritime Liens Act B.E.2537[1994], it likewise gave effect to the 1993 Convention in so far as the recognition of foreign vessel mortgage are concerned.¹¹

1.2.2 Rankings and Effects

The Convention's provisions on rankings and effects is likewise the same as that of the Lisbon Draft which provides to the effect that: as to ranking, mortgages, hypotheques and charges as between themselves, their effect with respect to third parties shall be governed by the law of the State of registration, and as to the enforcement, the procedure of which shall be governed by the law where the enforcement takes place. Both without prejudice to the rules and regulations provided in the Convention. Although the flag registry conflict of rule maybe a sensible one because this allows creditors to know in advance the law that governs and the priority of the credit extended, it cannot however be depended upon as problems might arise because flags of convenience, double-flagging and flagging out¹² of vessels are not uncommon today. In the Philippines, the law that governs personal property is the law where the chattel is located.¹³ It therefore differs from the Convention because the vessel may be arrested or the mortgage maybe enforced in a State other than the State of registration. Theoretically, under the current law Philippines law having more extensive list of maritime liens is more favourable for the mortgage creditors to enforce the mortgage in a State where its rights are better protected rather than in the Philippines whenever it's possible. This would not make sense. In the interest of uniformity and considering that the flag registry conflict of law rule is a sensible one, it is submitted that the Philippines should adopt the same rule and transform the existing into a supplemental one in cases where problems arise as a result of dual registration or flag of convenience.

1.2.3 Registration and Change of Ownership

In Par. 2 of Article 3, the purpose of which is to prevent dual registration of ships by requiring the State Party to secure a certificate of deregistration first before registering a vessel. The date of the deregistration as provided in the certificate will likewise be the date of the new registration.

¹¹ Therdchai Thanapongporn, *Security Rights Over Maritime Property Under Thai Jurisdiction*, The CIPITC Journal. Click at www.geocities.com/cipit_ejournal/art-eng/article_eng/Ship-in-Thai-jurisdiction.pdf

¹² Flagging out means vessels already registered under one State is registered in another temporarily usually as a result of a charter agreement.

¹³ Civil Code, Art. 16.

Article 3 Par. 1 provides a new provision which is not found in the 1967 Convention: other than in cases of forced sale, the provision ensures the protection to the security holders by requiring the State Party not to deregister any vessel unless the owner obtains the written consent of the said security holders or all previous mortgages, hypothèques and charges have been deleted. With the consent obtained, it only means that the security holders have been paid or another security has been given, otherwise consent would not have been obtained. However with respect however to obligatory deregistration because of a law requirement of a State Party, the state is required to notify the security holders before deregistering a vessel in order for the latter to protect its interest through an appropriate action. An example of a law requiring deregistration is failure to comply with the nationality requirements.

1.3 Maritime Liens

1.3.1 Characteristics of Maritime Liens

There is no definition for maritime liens in the Convention. It merely describes the same as one that follows the vessel, notwithstanding a change of ownership or registration or flag subject to the effects of forced sale under Article 12 which will be discussed later.

1.3.2 Recognized Maritime Liens

The following maybe referred to as international maritime liens as they are the maritime liens recognized internationally under the Convention as opposed to other maritime liens prescribed by the Convention which allows for the creation of additional maritime liens by States Parties within their domestic law or on a national basis:

1.) Claims for wages by the Master and members of the vessel's complement in respect of their employment on board the vessel, including cost of repatriation and social insurance contribution payable on their behalf.

The nature of seafaring which made seafarers a politically, legally and economically weak group in society, as they are "a group set apart from other members of the work force. Thus [...] they [do] not enjoy the same freedom as their sisters and brothers who work on shore by virtue of having to

live and work far from home and community.”¹⁴ Justice Joseph Story in *Brown v Lull* describes seaman as “a class of persons remarkable for their rashness, thoughtlessness and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for most part incapable of duly appreciating their value.”¹⁵ The need for a tenderness, partiality and favour in law for the interests of the seaman is obvious. “The reason for this humanitarian sympathy has been said to lie not only in the recognition of the ignorance and injudicious of the average seaman, but also in awareness of his harsh working environment, the unfair power imbalance between him and the shipowner and the relentless drive for commercialism, [...]”¹⁶ Since wage is a basic right of a seaman, it therefore follows that it must be secured by way of maritime lien.

The cost of repatriation and social insurance contribution payable on their behalf of seamen is an expansion of the provisions of the 1967 Convention. The cost of repatriation was added to address the problem of abandonment of seafarers as a consequence of bankruptcy of the shipowners or operators. This problem arises more and is linked to open registries due to lack of effective control of shipping associated with open registries which results in poor safety records.¹⁷ From 1996 to 1999, there were 210 reported cases in which about 3,500 seafarers were stranded in foreign countries without payment or other support, in connection with bankruptcies of single ship companies.¹⁸ A study on individual cases reported by the International Transport-Workers Federation (ITF) shows that during the period of 1994 to 1997, there were 992 incidents that could be regarded as abandonment and abuse. “Dispute of wages” were the most common (418 cases) followed by “abandonment” and “repatriation” with 84 cases.¹⁹ In fact, the problem of repatriation was one of the problems addressed by the Maritime Labour Convention, 2006. This Convention provides, among others, to the effect that if the shipowner fails to make arrangements for the repatriation of a seafarer, the member State whose ship flies its flag shall arrange the same and should it fail also, the state of which the seafarer is a national of shall take care with the cost recoverable against the member flag State who in turn may recover costs from the shipowner.²⁰ Regardless of the success of the Maritime Labour Convention 2006 (MLC, 2006), it is still necessary to have a security for the recovery of the cost by subrogating the one who paid in behalf

¹⁴ See: Paul K. Chapman, Trouble on Board-The Plight of International Seafarers.

¹⁵ 4 F. Cas. 409 (C.C Mass.1836) Cf. *The Minerva*, 1 Hag. 347 (1825) (Adm.Ct.) Cited by K.X. Li at Journal of Maritime Law and Commerce Vol. 33 No. 3, July 2002, p 382.

¹⁶ Thomas Maritime Liens (1980) p168; Tetley Maritime Liens and Claims (1985) p 100.

¹⁷ Committee of Inquiry Into Shipping Report, 51 1970, Cmmd 4337 (Rochdale Report).

¹⁸ K.X Li and Jim Mi Ng, International Maritime Conventions: Seafarers Safety and Human Rights, Journal of Maritime Law and Commerce, Vol. 33, No. 3, July 2002, p 384.

¹⁹ *Ibid.* cited Alistair Dougal Couper, Voyages of Abuse: Seafarers, Human Rights and International Shipping p 42 (1999).

²⁰ Maritime Labour Convention, 2006, Regulation 2.5(5)(a).

of the seaman for its repatriation to encourage shouldering the cost thereof, and this can only be done through a maritime lien.

Although this lien affects the security of the mortgagee, it however adds to the safe navigation and operation of the vessel. Furthermore, as can be seen above social justice justifies such claims.

2. Claims in respect of loss of life or personal injury occurring in direct connection with the operation of the vessel.

The intention of such liens is to indemnify the victims and to encourage safe navigation. Such claims are however covered by the standard insurance for hull and machinery policy and third party liability. This affects the security of the mortgagee in cases where the owner breached the terms of the policy, such as in the case of failure to pay premiums. That's why it is necessary for the State to provide a mechanism to ensure that vessels sailing are covered by insurance such as providing through law an extension of validity for a reasonable period of the coverage until the mortgagee is notified and given ample time to take the appropriate action to protect his interests. The current practice in the Philippines to ensure coverage is undertaken through the issuing of a Cease and Desist Order to prevent vessels from continuing with their operation without coverage. Such law or policy is imperative to ensure protection to the mortgagee because should it happen that no insurance indemnity is paid out, the claims by the victims having a status of maritime lien therefore a priority in payment, may be large thus exhausting the proceeds from the sale of the vessel.

3. Claims for reward of salvage of vessel.

The basis for this claim in the early times was *negotiorum gestio*.²¹ The Convention however is silent with respect to contract salvage which also has a status of a maritime lien in the Philippines. The difference between the contract salvage from salvage is that the latter under general maritime law is the salvaging of a vessel in peril is made voluntarily unlike the former where parties agree to salvage a vessel for a consideration. This also affects the security of the mortgagee but great weight should be given because it preserves the res thereby benefiting all the other lien holders. It encourages saving the vessel. Like the claims for loss, to protect the mortgagee, the State must also include in its law the inclusion of payment for salvage claims in the insurance policy or covenant. Such inclusion may

²¹ *Negotiorum Gestio* is a principle of law where the remuneration should be given to individual who performs an act which he has no obligation required by law. This is based on the principle that no one should be enrich in the expense of the others.

however increase insurance premiums thereby increasing the cost for operations. But it may also be more beneficial in the pursuit of the objective which is to promote financing for the development of the domestic fleet.

4. Claim for port, waterway and pilotage dues.

Collection of the claims for ports and waterway dues create income for the government and such income may be necessary in the development and the operations of the ports and channels. However, maritime lien protection over the same is no longer justified as ship financing outweighs its importance. This is more so where the States's ports are privately owned or controlled. In fact, numerous countries do not recognized this as maritime lien. This was only included in the Convention so as not to disappoint governments of States attending the conference such as Mexico, Panama and Columbia each even requesting that such claim be ascended to second rank.²²

5. Claims for tort arising out of physical loss or damage caused by the operation of the vessel other than loss or damage to cargo, containers and passengers effects carried on vessel arising from contractual relations.

In the 1967 Convention, the wording was “based on tort and not capable of being based on the contract.” Although most tort cases involve collisions or personal injury, torts here may include damage to the environment such as pollution except that caused by oil and other hazardous substances which are already covered in other Conventions. The injury committed here is on the water and the environment. The Convention which covers oil pollution is the International Convention on Civil Liability for Bunker Oil Pollution Damages, adopted 23 March 2001 but will only enter into force on 21 November 2008. In its resolution, in part, it recommends that persons taking reasonable measures to prevent or minimize the effects of oil pollution be exempt from liability unless the liability in question resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and without knowledge that such damage would probably result.²³ The hazardous substances are covered by International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996.

²² Jose Maria Alcantara, *Short Primer on the International Convention on Maritime Liens and Mortgages* Journal of Maritime Law and Commerce, Vol. 27, No. 2, April, 1996.

²³ [http://www.imo.org/Conventions/mainframe .asp?topic_id=256&doc_id](http://www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id).

1.3.3 Maritime Liens Excluded

What was not included is the tax due to the government which is a paramount consideration in the Philippines, such given the highest priority over all other maritime liens both in the old and the amending law.²⁴ It is submitted that, being a developing country, tax is the lifeblood of the government and it's necessary for its existence and continuance of its operation and should be ranked first among all others.

The general average claims is not included may also be correct. The doctrine of general average is of ancient vintage, and can be traced back to the remotest antiquity. In ancient medieval times happened that a ship was taken by storm at sea and, in order to save the voyage, part of the cargo was jettisoned to lighten the ship. In such circumstances, the owner of the cargo was granted a right to contribution. Under modern conditions however, such type of losses are exceedingly rare. What is frequent now are certain expenses and sacrifices that are incurred by the shipowner while underway, such as port of refuge expenses, collision expenses, and salvage expenses.²⁵ Thus, the doctrine of modern times is virtually always applied to enable the shipowner to recover ratably from cargo interests. As such, it also contributes to the preservation of the res but the object of providing adequate financing outweighs the advantages because primarily it develops or upgrades the domestic fleet or the vessels in the Philippines which are mostly old, delapidated and obsolete and substantially can affect the safety or the seaworthiness of the vessel. The upgraded vessels are a lot less susceptible to tragedies and accidents. Secondly, since the Government is in a position to suspend the possibility of lifting the cabotage laws and is concentrated more on the strengthening of the domestic fleet,²⁶ obtaining adequate financial assistance is one of the levelling field the domestic operators may enjoy which in turn lead to lower rates thereby leading to economic growth.²⁷ To create certainty or predictability without hesitation leads to the development of confidence in prospective investors and financiers.

Like the 1967 Convention, no lien was created for necessities or master's disbursements, such as supplies, furnishing repairs, towage, use of dry dock or marine railway or other necessities. The only exception is for repairs which has a right of retention. Under the 1926 Convention, necessities and supplies are protected by maritime liens because of the difficulty of securing the said supplies or services when the ship is in a foreign port. Although such may be beneficial to the safe navigation and

²⁴ Art. 580, Commercial Code of the Philippines; PD No. 1521 Ship mortgage Decree of 1978.

²⁵ Thomas Schoenbaum, Admiralty And Maritime Law Student edition p 523.

²⁶ MARINA Administrator Vicente T. Suazo Jr. in Malaya Newspaper, posted at MARINA.gov.ph website.

²⁷ Affirmation of the suspension of the lifting of the Cabotage laws was made with the enactment of the RA 9295 which gives more tariff or tax benefits particularly on importation.

operation, the convention may be correct not to include it leaving the problem on the procurement of the same to the owner which now is in a better position to transact or deal with current advance communication and banking technologies.

Claims on oil, nuclear and other noxious substance was likewise removed from the 1993 Convention is to avoid conflicts with other conventions relating to the carriage of hazardous substances and to prevent lien interference in compensation for oil pollution claims as discussed already under claims for tort.

Unlike the 1967 Convention, the lien for wreck and removal or general average contribution was removed. It however was included in Article 12(3) of the 1993 Convention as a predictable charge State Parties may provide in their laws, but only in respect of the cost of removal of a stranded or sunken vessel by a public authority for the safety of navigation and the protection of the marine environment.

1.3.4 Priorities of Maritime Liens

Under the Convention, the distribution of the proceeds from the forced sale of the vessel is ranked as follows:²⁸

1. The cost and expenses arising out of the arrest or seizure and subsequent sale of vessel;
2. Claims for wages and other sums due to the master, officers and other members of the crew in respect of their employment on the vessel, including cost of repatriation and social insurance contributions;
3. Claims in respect of life or personal injury in direct connection with the operation of the vessel;
4. Claims for reward for salvage of the vessel;
5. Claims for port canal, and other waterway dues and pilotage dues;
6. Claims based on tort arising out of physical loss or caused by the operation of the vessel;
7. Mortgage, hypothèques or other charges of similar nature; and
8. Residue will be return to the owner.

²⁸ Art. 5(1)(2) and Art. 12(2). 1993 Convention.

The costs and expenses include, *inter alia* the cost for upkeep of the vessel and the crew as well as wages, other sums and cost for the members of the crew incurred from the time of arrest or seizure.²⁹

The reward for salvage however shall take priority over the all maritime liens which have accrued prior to its operation.³⁰ The reason for giving it such a high priority is to encourage salvage operations which salvors would be hesitant to undertake because for fear that there may be already liens which will be given more priority. As for priority between rewards for salvage, the priority is ranked in the inverse order of the attachment the later one given the priority over the earlier ones.³¹ These rules on salvage are based on the principle of preservation of the res in which all other subsequent holders will benefit because without the salvage operations, there would be no proceeds to be distributed to the other lien holders.

With respect to the existence of maritime liens within the same categories, they shall be rank *parri passu*³² between themselves.³³

1.3.5 Extinction by Lapse of Time

The maritime liens statute of limitations is termed extinction instead of prescription. Under the 1926 Convention the maritime liens expire after one year except for necessities which is given a period of only six months. The Convention also allows interruption of the running of the period on grounds to be determined by the law of the court hearing the case.³⁴ Moreover, the 1926 Convention allowed State Parties to enact national law extending the period in cases where it is impossible to effect arrest within the said period. Clearly, these provisions introduce uncertainty as the nature of the circumstances or grounds leading to the interruption are left to the national law that might be conducting the forced sale.

Under the 1993 Convention, as with the 1967 Convention, this problem was rectified by setting the period to one year but not subject to suspension and interruption unless vessel is arrested or seized prior to the expiry of such period.³⁵ As a consequence of the non interruption, lien holders can

²⁹ Art. 12(2). 1993 Convention.

³⁰ Art. 5(3). 1993 Convention.

³¹ Art. 5(4). 1993 Convention.

³² Means equal footing.

³³ Art. 5(4), 1993 Convention

³⁴ Jose Maria Alcantara, *Short Primer on the International Convention on Maritime Liens and Mortgages* Journal of Maritime Law and Commerce, Vol. 27, No. 2, April, 1996.

³⁵ Art. 9. 1993 Convention.

no longer invoke grounds provided for under national laws. Exception is however provided to the effect that time does not run during the period that the arrest or seizure of the vessel is not permitted by law.³⁶ This may include *force majeure*. The reason for the exception which was proposed by the Norwegian and Swiss delegates³⁷ and accepted by the conference is because of a hypothetical problem that might arise in case where a request of a vessel is made by a flag State and the arrest of said vessel cannot be completed due to conflict of laws between States.

The running of the expiration period for social claims such as seamen's wages, social contribution and for repatriation however commences from the day he is discharge unlike the other maritime liens which commence from the day it arises.³⁸ This was proposed by the Norwegian delegation in the conference.³⁹ The intention was to delay the commencement of the running of the period for the benefit of the seamen because it is very possible that the seamen will still be on board the vessel while the cause of action have arises and the expiration period will have already commenced. As such seamen will be left with little time, if not no time at all, resulting in injustices and denial of its claims.

The intention of setting the expiration of maritime lien to one year is to regularly eliminate the liens on the vessels. As a consequence, lien holders under the 1993 Convention should arrest or enforce their claim immediately otherwise they will lose their lien status. The insolvent shipowner therefore is often liquidated thus also eliminating the possibility of subsequent liens thereby protecting potential subsequent creditors from losses. As lesser subsequent liens are created, obviously the buyers through voluntary sale are in a better position. The disadvantage however of enforcing claims immediately is that trade and commerce may be interrupted even if sometimes it might not yet be justified. Such practices may also lead to more court litigations.

The expiration of one year also affects States applying the "voyage rule" or "time rule" which is a predominant feature in French maritime law and features also in American maritime law. The voyage rule is one found under Article 6 of the 1926 Brussel's Convention, and stipulates that a lien attaching to the last voyage have priority over those attaching to the previous voyage. This rule was

³⁶ Art. 9(2). 1993 Convention.

³⁷ Report of the UN/IMO Conference on Convention on Maritime Liens and Mortgages in Geneva A/CONF. 162/8 21 July 2003.

³⁸ Art. (2)(a). 1993 Convention.

³⁹ Report of the UN/IMO Conference on Convention on Maritime Liens and Mortgages in Geneva A/CONF. 162/8 21 July 2003.

adopted by France when it ratified the 1926 Convention. The United States however amended the concept in the later part from voyage to season rule (for vessels on Great Lakes) and the “Calendar rule” and the “season rule”.⁴⁰ With such rules in addition to the one year limit, the pressure of enforcing claims by creditors is doubled considering that aside from losing the status of maritime lien after the lapse of one year, priority may be displaced by subsequent liens that may be attached to the vessel. This practice is opposite to that of the British system where subsequent liens may accumulate without prejudice to its priority.⁴¹

In the Thai Jurisdiction, the time bar for maritime liens has already been set to one year from the occurrence thereof as provided in the three conventions. But Thai law does not speak about the interruption period when the vessel has been arrested or seized as the three conventions do.⁴² It also appears that the statute of limitation applies generally to all maritime liens and no distinction was made with respect to social claims unlike the present convention.

In the Philippines, the statute of limitations is governed by the Civil Code as nothing is mentioned in the Ship Mortgage Act of 1978.⁴³ There are different prescription periods for different categories of actions under the Civil Code such as actions for injury to the rights of the plaintiff and quasi-delict which is equivalent to tort and must be instituted within four years.⁴⁴ Actions for an obligation created by law and actions based on written contract which must be instituted within 10 years.⁴⁵ All of them have a longer prescription period compared to the Convention and also because of the different categories of actions, this may lead to confusion and it would seem better to have one applicable to all maritime liens. As such it is submitted for the interest of uniformity and the advantages of having a shorter life of a maritime lien to adopt the Convention.

1.3.6 Other Maritime Liens

The 1993 Convention allows State Parties to create in their domestic law other maritime liens on vessels to secure claims other than those already recognized under the said Convention

⁴⁰ Thomas Shoenbaum, p 265.

⁴¹ Justice Waung, Maritime Law of Priorities: Equity, Justice and Certainty, (2005) 19 MLANZ Journal, p 15-16.

⁴² VMML, Art 28; Therdchai Thanapongporn, *Rights Over Maritime Property Under Thai Jurisdiction*, The CIPITC Journal p 5. Click at www.geocities.com/cipit_ejournal/art-eng/article_eng/Ship-in-Thai-jurisdiction.pdf.)

⁴³ Art. 1139 to 1155, Civil Code.

⁴⁴ Art. 1146(1)(2), Civil Code.

⁴⁵ Art. 1144, Civil Code.

(international maritime liens) against the owner, demise charterer, manager or operator of the vessel.⁴⁶ These other maritime liens (domestic or national maritime liens) differ from the international maritime liens on the following manner:

First, unlike the latter which expires after a period of one year, the former expires only after a period of six months or at the end of a period of sixty days following a sale to a bonafide purchaser of the vessel. The period is to commence on the date on which the sale is registered in accordance with the law of the State with which the vessel is registered following the sale, whichever period expires earlier.⁴⁷

Secondly, unlike the international liens which ranks ahead of mortgages, the domestic liens ranks after mortgages.⁴⁸ The provision on other maritime liens was obviously provided as a compromise to some state parties which have more list of maritime liens such as the United States and who might want to add other maritime liens not recognized under the Convention. During the Conference, the representative of the United States however stated that:

“in order for a new convention to be widely accepted, the new convention would have a balance fairly the maritime interests of shipowners and mortgages, of those who provided services to ensure the continued safe operation of ships, and those who suffered harm from operation of ships, including damage to the environment, unless compensation was provided by another international convention.”

He further added that:

the important purpose underlying the convention was to protect the lender’s security in order to encourage greater ship financing. However equal consideration should be given to other purposes such as ensuring the security for those who extended credit to support a ship’s operation by supplying victuals for the crew and services to the vessel.⁴⁹

From this statement and taken together with United States current recognized liens, it can be said that other maritime liens under the 1993 Convention is not a satisfactory compromise for the

⁴⁶ Art. 6, 1993 Convention.

⁴⁷ Art 6 (b)(i) and (ii), 1993 Convention.

⁴⁸ Art. 6(c).1993 Convention.

⁴⁹ Report of the UN/IMO Conference on Convention on Maritime Liens and Mortgages in Geneva A/CONF.162/8 21 July 2003 no. 19, p 7.

U.S.A. This is further evidenced as in the U.S.A other maritime liens will only be subordinate in priority to that of the mortgagee which takes up the lion share of the proceeds in the case of a forced sale.

During the 1993 Convention, Norway, one of the very few States to have adopted and implemented the 1967 Convention favoured the deletion of Article 6:⁵⁰ the provision on other maritime liens even if they were given priority after mortgages or hypothèques. It is the delegation's view that suppliers of goods and services to vessels was that they should like other suppliers, make credit risk assessments rather than extend credit more or less automatically with hidden charges against the vessel as collateral.⁵¹ In the latter cases, owner's who were financially unsound would have the possibility of continuing trading to the detriment of the mortgagee. Adding that there were also unfortunately frequent cases in which financially unsound charterers traded on the credit of the owner and the mortgagee without their knowing it. This could only happen when suppliers gave charterer's unwarranted credit knowing that they had a hidden charge against the vessel security.⁵²

In the Philippines, currently it recognizes a maritime lien for necessaries and supplies. That is the reason why there is a proliferation of repairmen and supply men in the country as they are in a better position than those in countries who do not recognize these liens. The proliferation of the repairmen and suppliers is also beneficial to the maritime industry. Considering this, the creation therefore of other maritime liens under the Convention favours the Philippines as it allows the same to create a maritime lien for necessaries which although rank only after mortgage, it is still better than nothing at all, and also at the same time still consistent with the objective of strengthening the protection of the mortgagee.

1.3.7 Assignment/Subrogation

The 1993 Convention allows assignment of or subrogation to a claim secured by a maritime lien generally.⁵³ An exception however is the additional protection afforded to the mortgagees under the 1993 Convention where it excludes maritime lien holders from being subrogated to the insurance monies payable to the owner.⁵⁴ With the law of state parties providing for mechanisms ensuring the

⁵⁰ Report of the UN/IMO Conference on Convention on Maritime Liens and Mortgages in Geneva A/ConF .162/8 21 July 2003 no. 14, p 6.

⁵¹ *Ibid.*

⁵² Report of the UN/IMO Conference on Convention on Maritime Liens and Mortgages in Geneva A/ConF .162/8 21 July 2003 no. 14 p 6.

⁵³ Art. 10(1), 1993 Convention.

⁵⁴ Art. 10(2), 1993 Convention.

insurance coverage against risk of loss of life or injury and covenant for salvage, fewer categories of maritime lien holders will be sacrificed giving way to more protection to mortgage holders.

1.4 Common Provisions

The present subsection provides an overview of the notices and effects of forced sale which are provisions under the Convention common to both maritime liens and ship mortgages.

1.4.1 Notice of Forced Sale

Under Article 11 of the 1993 Convention requires the State registrar notices given to all the holders of mortgages “hypotjeques” or charges whether issued to bearer or not and the holders of a maritime lien at least 30 days prior to the forced sale. The purpose of such requirement is to allow the named persons to protect their interest. In reality however, the notice requirement through registered letter and electronic mail is impractical to carry out due to the difficulty of obtaining the addresses of the parties with interest. Publication therefore or through is therefore the more practical way although the same may not be as effective.

1.4.2 Effects of Forced Sale

Under Article 12 of the Convention, the effects of forced sale are as follows:

1. All registered mortgages, “hypothèques” or charges, and all liens and other encumbrances of whatever nature shall cease to attach to the vessel subject to the following requirements:
 - a. With respect to registered mortgages, “hypothèques” or charges assumed by the purchaser, consent from the holder must be obtained;
 - b. At the time of the sale, the vessel is in the area of the jurisdiction of the state conducting the forced sale; and
 - c. The sale has been effected in accordance with the law of the said state and the provisions on the notice of sale.
2. The proceeds of the sale are distributed in accordance with the priorities already mentioned above under sub-section 1.3.4. With respect to the residue returned to the owner, after satisfaction of all the claims, if there’s any, the Convention provides that it shall be freely transferable.
3. A State Party may provide in its law that in the event of the forced sale of a stranded or sunken vessel following its removal by public authority in the interest of safe navigation or

the protection of the marine environment, the cost of removal shall be paid out from the proceeds of the sale before all other claims including maritime liens.

4. If at the time of the forced sale, possession of the vessel is with the shipbuilder or repairer, provided that right of retention is given by a state party conducting the sale, said possession shall be surrendered to the purchaser but said shipbuilder or repairer shall be entitled to obtain satisfaction of his claim after the payment of the maritime liens.
5. The production of Certificate by the Competent Authority of a State Party upon request of the purchaser after compliance with the requirements and the Registrar bound to delete all registered mortgages, "hypothèques", or charges except those assumed by the purchaser, and to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of a new registration, as the case may be.
6. State Parties shall ensure that any proceeds of a forced sale are actually available and freely transferable.

In the Philippines, it is provided in Section 17 (a) of the Ship Mortgage Act that:

Upon the sale of any vessel of the Philippines covered by a preferred mortgage in any extrajudicial sale or by order of a district court of the Philippines in any suit *in rem* in admiralty for the enforcement of a maritime lien other than a preferred maritime lien, the vessel shall be sold free from all pre-existing claims thereon.

And Section 19(c) in part also provides that:

upon sale of any vessel of the Philippine covered by a preferred mortgage in a extrajudicial sale or by order of a district court of the Philippines in any suit *in rem* in admiralty for the enforcement of a maritime lien, the vessel shall be sold free from all pre-existing claims thereon.

From these provisions, it can be seen that in the Philippines maritime liens and all the other charges cease to attach to the vessel at the time of forced sale as prescribed by the Convention.

However, the second part of Section 19 states that:

but the court shall, upon the request of the mortgagee, the plaintiff, or any intervenor, require the purchase at such sale to give and the mortgagee to accept a new mortgage of the vessel for the balance of the term of the original mortgage. The conditions of such new mortgage shall be the same, so far as practicable, as those of the original mortgage and shall be subject to the approval of the court. If

such new mortgage is given, the mortgagee shall not be paid from the proceeds of the sale and the amount payable as the purchase price shall be held diminished in the amount of the new mortgage indebtedness.

This provision puts the investor in a bad position as it may be construed that the investor may be compelled to accept and constitute a new mortgage with respect to the balance of the indebtedness with a purchaser at the forced sale whom the investor has no relationship whatsoever and whether or not said purchaser is a good debtor. It is contended that investor will be forced to buy out the claims or bid for itself for the purchase of the vessel in order to protect its interest from those undesirable debtors.⁵⁵ Section 19(c) is basically the same as Section 921(c) of the U.S. Ship Mortgage Act, but the second part of which cannot be found under the Convention as well as in legislation of most States including Australia. Considering that the constitution of a new mortgage is not favorable to the mortgagee, it should therefore be deleted.

1.5 Other Provisions

1.5.1 Rights of Retention

Following the 1967 Convention, the 1993 Convention allows state parties to create a law on “right of retention”, sometimes termed as “possessory lien”. This lien grants possession of a vessel to either the shipbuilder, to secure the payment for the building of the vessel, or shiprepairer, to secure claims for repair, including reconstruction of the vessel. Possession of the lien is retained until payment has been made.⁵⁶ Such rights shall be extinguished when the vessel ceases to be in their possession.⁵⁷ Surrender, however must be made to the purchaser in case of forced sale in exchange it shall obtain satisfaction of its claim from the proceeds of the sale after the payment of the maritime liens.⁵⁸ The 1993 Convention conceded making the rights of retention take priority over mortgage claims and thus maybe harmful to the mortgage creditor. In theory, the priority accorded to the possessory lien over the mortgage creditor makes economic sense considering that the repair would increase the value of the ship. In China, the practice however led to a situation of injustice when through fraudulent scheme the ship repairer and shipowner conspire to increase the costs of repairs extensively and unnecessarily, and later on exercise the possessory lien upon the vessel pursuant to Article 25 of the Chinese Maritime

⁵⁵ Hernandez, Velicaria and Hernandez, *Philippine Admiralty and Maritime Law*, p 209.

⁵⁶ Art. 7(1) [a]and [b] 1993 Convention.

⁵⁷ Art. 7(2) 1993 Convention.

⁵⁸ Art. 12 (4)1993 Convention.

Code and uses the priority over the mortgagee to recover the repair charges from the proceeds of the forced sale. As a consequence, the shipowner could no longer recover the full amount because the repair value will be near the actual value of the vessel leaving the mortgagee little money after the possessory lien has been satisfied.⁵⁹

In the US, the problem regarding the fraudulent scheme described above is minimized because if the ship mortgage occurs before the lien of “necessaries”, a ship mortgage will take priority over the ship repairer. As such, the mortgagee is protected from the fraudulent scheme undertaken by the ship repairer and the shipowner. Furthermore, if the execution of the mortgage happens after the lien for “necessaries”, the Ship Mortgage Act requires a “duty of disclosure” where the shipowner has a duty to the mortgage creditor to disclose all existing liens before the execution of the mortgage.⁶⁰ Such duty therefore serves as a warning to the mortgagor and he can adjust accordingly the loan extended or refuse it altogether.

The Philippines adopted the same rule which is more advantageous compared to that of China and the Convention. But if a lien for necessities and supplies is to be removed, which as mentioned is justified in the pursuit of the objective which is to limit the number of liens in line with the Convention, the rule may have to be amended. Such amendment should be similar in principle, which is, in addition to the duty of disclosure, possessory liens should be placed instead of lien for necessities, and between said possessory lien and ship mortgagee, priority should be given to the one which attaches or incurred first. However what should be subordinate to the maritime lien so as to be more compatible with the Convention. This is a more fair rule, as the possessory lien is the only security left for necessities, supply and repair with the removal of its status as a maritime lien.

1.5.2 Temporary Change of Flag

With the recent popularity of open registries, the Convention provides more details and rules relating to temporary registration of vessels focusing on the original state registration as the governing law and the requirements for registrations to ensure vessels are flying under one flag only. Flying under one flag is important because double flagging would cause all kinds of confusion and difficulty of determining the rights, obligations and the applicable law that will govern the vessel. Article 16 provides the following measures:

⁵⁹ Jimmy and Sik Kwan Tai, *The Different Approaches to Recent Developments in Chinese and US Ship Arrest Laws*, EJCL Vol.9.3 October 2005 p 8.

⁶⁰ 46 U.S.C S 31323 (a) provides that “upon the request of the mortgagee, the mortgagor is to disclose in writing the existence of any obligation known to the mortgagor on the vessel to be mortgaged.”

1. That the law of the State of registration shall be determinative for purposes of recognition of registered mortgages, “hypothèques” and other charges. The State of registration refers to the registration prior to the change of flag. This ensures that one law governs in cases where
2. The State of registration shall require a cross-reference entry in its register specifying the State whose flag the vessel is permitted to fly temporarily.
3. That no state party shall permit a vessel registered to fly its flag temporarily unless all mortgages, “hypothèques” or charges on the vessel have been previously satisfied or the written consent of the said holders are obtained.
4. The notice requirements provided under the Convention should likewise be complied with.

The aforementioned measures therefore eliminates conflict of double sales or mortgage where vessels are registered in more than one State.

1.5.3 Conflict of Convention

Under Article 15 of the 1993 Convention states that nothing in this Convention shall affect the application of any international convention providing for limitation of liability or of national registration. This provision was inserted to avoid conflict. There are a number of Conventions which provide for limitation of liabilities. Among them are the International Convention on Civil Liability for Bunker Oil Pollution Damages, adopted 23 March 2001, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996. and the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976.⁶¹

1.6 The Lack of Protection to Innocent Purchasers

Unlike possessory liens where the shipbuilder or repairer can hold a ship or vessel until the amount due is paid for the building or the repairs rendered, and therefore the legal charge is more apparent, maritime liens on the other hand are more hidden. The charge follows the ship wherever it may go notwithstanding change of ownership, registration or flag and it arises after an occurrence of transaction or the occurrence of an event without a need of antecedent formality. Maritime liens are

⁶¹ Convention on Limitation of Liability for Maritime Claims was amended by Protocol 1996.

sometimes referred to as “secret liens”. For Example: Let’s say a ship was furnished or has been supplied in China and left the port to the Philippines. Now in the Philippines, the owner of the vessel wants to sell the vessel and declares in its bill of sale or contract of sale that there is no outstanding encumbrance or maritime liens on the vessel. The innocent purchaser now parts with his money in exchange for the vessel. In reality however, assuming that in China there is a maritime lien for necessaries, the supplier for the necessaries now would want to enforce its claim and since the charge follows the vessel and will not be extinguished despite change of ownership. The vessel which is now owned by the innocent purchaser will be subject to the charge and liability to his detriment. Usually the innocent purchaser would not know of the existence of these maritime liens as it may not be recorded in the State where the vessel was registered, unlike mortgages because it will arise without need of any formality after a transaction or the occurrence of an event such as registration. Only the holder of a lien and the original owner of the vessel only knows of this lien and obviously the latter will not be much help. Although there may be some sort of records of liens in the court of the State where the ship is registered, the buyer cannot be expected to visit all the ports where the vessel went for the last year maritime liens usually expires in one year as provided for under the Convention but may however also be extended depending of the law of the State. When the vessel is arrested so as to enforce the claim of the vendor, since the buyer is now the owner, he must put up bail or any alternative security for the release of the ship in order to continue with operations. Although the buyer has a recourse against the original owner/ vendor based on a stipulation they may provide in their bill of sale or contract of sale, going after the same will be an additional expense and what is worse is when the original owner is insolvent or bankrupt leaving the buyer with nothing to pursue. Another issue arises when the buyer has no money or cannot put up the bail, thus leading to the forced sale of the vessel which is usually sold below the actual value.

The system therefore creates injustices, the buyer being penalized for something which he has nothing to do with because he was not involved in the transaction or relationship between the vendor and the one who provided for the supply or necessary, while the vendor on the other hand who was the wrong doer is rewarded as he is being freed from any penalty.

In addition to above, the arrest of a vessel for claims interrupts commerce and operation. This is why as a solution to the problem an international registry was proposed. Through this approach the buyer would be able to know what liens are attached to the vessel prior to its purchase as it will now be on public record. Furthermore, this will encourage the debtor to pay its debts. There is nothing under the 1993 Convention however requiring maritime liens to be registered. The abandonment of the idea made the Convention fall short, or not fully responding, to objectives of its sponsors the UNCTAD and

IMO.⁶² Pending the creation of this international registry, the best solution is to require registration at a national level where the vessel is registered considering that the bill of sale and mortgage maybe found there anyway together with other particulars when inspected. To solve the problem, Dr. Peter Heatcote suggested that a national law should be enacted or changed by means of the following language:

Notwithstanding anything contained in this Act or the International Convention on Maritime Liens and Mortgages, 1993, a maritime lien is not enforceable against ship owned by a bona fide purchaser for value without notice unless such lien has been registered, but it is enforceable against the owner and vendor who has incurred the debt from which the maritime lien arises, irrespective of registration.⁶³

The convenience and easy access to registration should however be considered and the Registrar should also only have a ministerial function meaning he should not exercise discretion. As long as the information is receive his only duty is to record it accordingly.

The problem continues to persist when States do not provide or give effect in a force of law similar to the above.

1.7 Conclusion

Unlike the 1967 Convention which never came into force, the 1993 Convention enjoyed a relatively small success. The latter did not however obtain wide support from the international community as it does not contain substantial changes compared to the 1967 Convention. The reasons for the little-acceptance of this new instrument are the same to that of its predecessors, some of which are the difficulty of implementation due to the difference in of legal systems such as the common law system in which laws results mainly from a judge making laws and law precedents carrying with it the different rules or principles in ranking liens, public policies and equity which have to be factored in, as opposed to civil law system which merely depends on the statutory ranking of maritime liens; difference of wealth thereby resulting to different priorities in the ranking of liens such as ranking ahead the salvage which preserves the vessel in turn benefiting all the lien holders, or damages as measure for giving more weight to safety of life at sea, navigation and protection of the marine environment as opposed to the promotion of the economy which ranks ship mortgages ahead, and

⁶² Jose Maria Alcantara, *A Short Primer on the International Convention on Maritime Liens and Mortgages*, Journal of Maritime Law and Commerce, Vol. 27, No. 2, April 1996.

⁶³ (2003) 17 MLAANZ Journal. p128.

others such as different public political system, public policy or order of countries and reluctance to part with sovereignty. The international registration as proposed failed to materialize. There are however improvements on the Convention. Particularly the careful regulation of registration and security which is treated in the international level and more suitable protection to the holders of lien and mortgages; The Convention promoted international uniformity; The unjustifiable maritime liens which were included before have been removed; The seamen are afforded more protection with the expansion of repatriation cost and social contribution; The priorities are more logical especially on the salvage operations. The authorization of domestic liens and most of all an improvement in terms of having more favourable financing climate to investors. Overall, the Convention therefore is suitable for this modern time marine market and therefore serves as a good model for countries to pattern their laws to should they choose not to ratify.

2 Maritime Liens

2.1 Introduction

The Australian law system on maritime liens and mortgages gives great protection to the mortgage creditors. The priority accorded to the mortgage security is even higher compared to that of the 1993 Convention. Since one of the objectives is to provide a more favourable financing climate, it would be prudent also to look at the system in Australia in addition to the 1993 International Convention on Maritime Liens and Mortgages. This chapter provides a comparable overview of the Philippine and Australian laws on maritime liens, more particularly its nature and characteristic, the property to which it attached, the transferability, the priority of liens and the conflicts of law rule.

2.2 Basic considerations

2.2.1 Australia

Australia has a common law legal system. There are two types of claims namely the proprietary claims and the general maritime claims.⁶⁴ Under the general maritime claims are maritime lien claims and claims arising from rights based on statutory actions *in rem*. Distinction must be made between the two hereto wit: Firstly, maritime liens are given privilege in the priority over all other claims over the res in the distribution of the proceeds of the sale. Secondly, that it survives the change of ownership while statutory right *in rem* does not; and Lastly, maritime lien attaches to the property dating back to the occurrence of certain acts⁶⁵ and events unlike statutory *in rem*, where priority dates only from the time proceedings *in rem* are commenced, for only then does the charge attach to the property to secure the claim.⁶⁶ S 20(2) provides for those claims giving right to action *in rem* which list also include those recognized or listed as maritime liens, the latter therefore may themselves give rise to statutory actions *in rem*.⁶⁷ The same Act provides for a list of maritime liens which includes:

1. Salvage;
2. Damage done by ship;
3. Wages of the master or members of the crew, of a ship; and

⁶⁴ Admiralty Act 1988 Section 4(2),(3).

⁶⁵ The Bold BurcCleugh (1851) 7 Moo p 267.

⁶⁶ See: Davies and Dickey Shipping Law second edition, cited C & CJ Northcote v. The Owners of Henrich Bjorn: The Henrich Bjorn (1886) 11 App CA 270 at 277; The Cella (1888) 13 PD 82

⁶⁷ Admiralty Act 1988.

4. Master's disbursements.⁶⁸

Although claims for respondentia and bottomry are not included in the list, they still attract maritime liens. Such claims however are now obsolete with today's advanced technologies in communications. No definition of maritime liens was made under the Act which means that it only recognizes existing traditional judicial definitions. Under the said act, it is provided that no new maritime liens or other charges are created; or a causes of action that would not have existed if this Act had not been passed.⁶⁹ Only those traditional maritime liens accepted in English Law are therefore recognized, and no further Maritime Liens are created unless a specific legislation creates them. Example, in *Seward v. The Vera Cruz*,⁷⁰ the House of the Lords held that claim arising under Fatal Accidents Act of 1846 could not be pursued by an action *in rem* for damage done by ship on the basis that the Act was "legislation for the general case and not for particular injury of ships". Whilst it is clear that such a claim could now be pursued *in rem* pursuant to the provisions of the Supreme Court Act 1981, it would almost certainly not attract a maritime lien.⁷¹ Maritime liens are defined in Civil law as "maritime privileges" ("privileges maritimes" in French) and this character was recognized in common law courts.⁷² In *The Bold Buccleugh*, Sir John Jervis defined a lien as

Having its origin in this rule of the Civil law, a maritime lien is well defined by Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process *in rem* [...] This claim or privilege travels with the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into legal process by a proceeding *in rem*, relates back to the period when it first attached.⁷³

In *The Ripon City*,⁷⁴ Gorrell Barnes J described a maritime lien in the following terms:

[...] a privilege claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another *in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing.

⁶⁸ In Michael White Australian Maritime Law p 30, Masters' wages and master's disbursement claims did not originally confer maritime liens; however those claims were subsequently elevated to the status of maritime liens by Merchant Shipping Act 1854.

⁶⁹ Admiralty Act S 6.

⁷⁰ *The Vera Cruz (No 2)*(1884) 10 App Cas 59,69.

⁷¹ See: Derrington and Turner, The Law and Practice of Admiralty Matters p 57.

⁷² William Tetley in Maritime Liens in the Conflicts of Law citing(1851) Moo. p 267, 284, 13 E.R. 884 p 890

⁷³ (1851) 7 M00. p267, 284.

⁷⁴ (1897) p 226, 242.

In *The Tolten*,⁷⁵ Scott L. J., observed that: The essence of the privilege' was and still is, whether in Continental or English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the privileged creditor. The charge goes with the ship everywhere, even in the hands of purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages.

According to Thomas, the fundamental characteristics of a maritime lien are as follows:

- 1) A privileged claim or charge;
- 2) Upon a maritime property;
- 3) For service rendered to it or damage done by it;
- 4) Accruing from the moment of the events out of which the cause of action arises;
- 5) Travelling with the property secretly and unconditionally; and
- 6) Enforced by an action *in rem*.⁷⁶

It is a privilege claim in the sense that it is given high priority in ranking over mortgages, possessory liens and statutory rights *in rem* in the distribution of proceeds. Maritime liens cannot be granted or otherwise specifically created.⁷⁷ Exception, however to the rule are *respondentia* and *bottomry* which are created by agreement but are treated as *sui generis* and not considered as a species of maritime lien.⁷⁸ Although maritime lien cannot be created by agreement the ambit, enforcement and survival of a maritime lien may nonetheless be regulated by agreement. So a maritime lienholder may by agreement suspend, waive or extinguish his *right in rem* subject to a statutory enactment to the contrary.⁷⁹

⁷⁵ (1946) p135,150.

⁷⁶ Thomas Maritime Liens p 11-15.

⁷⁷ Davies and Dickey citing Admiralty Commissioners v. Valverde (Owners) (1938) as reference.

⁷⁸ Davies and Dickey, Shipping Law, 2nd Edition.

⁷⁹ Thomas, Maritime Liens, p 24.

2.2.2 Philippines

The Philippines has a mixed legal system both civil law and common law. Law provisions on liens are primarily found in the Commercial Code⁸⁰ which was inherited from the Spanish regime during the colonialization. Some provisions were however altered by the Ship Mortgage Decree of 1978 which was patterned quite closely on the provisions of the U.S Ship Mortgage Act of 1920 and, to a lesser degree, on the Liberian Maritime Law relating to preferred mortgages.⁸¹ Being of foreign origin, the provisions of the Ship Mortgage Decree of 1978 may thus be construed with the aid of foreign jurisprudence from which they are derived, except insofar as they conflict with existing laws or are inconsistent with local customs and institutions.⁸² In an earlier decision by the Philippine Supreme Court, a lien was described as “a hypothecary right over the vessel which constitutes a guarantee for the satisfaction of their claims, in so far as may be covered by the proceeds of the sale of the vessel, whether the sale be voluntary or judicial, in the order given”.⁸³ In *McMicking v. Banco Espanol-Filipino*⁸⁴, It was declared that “liens in favour of creditors under Article 580 of the Code of Commerce are known as legal liens, and whoever buys a vessel or loans money with the vessel as security on a chattel mortgage takes the vessel subject to such prior lien.” After the passage of the ship mortgage decree of 1978, the Philippine Supreme Court pronounced that:

Maritime lien constitutes a present right of property in the ship, a *jus in re*, to be afterward enforced in admiralty by process *in rem*. From the moment the claim or privilege attaches, it is inchoate, and when carried into effect by legal process, by a proceeding *in rem*, it relates back to the period when it first attached.”⁸⁵

Thus, any purchaser or charterer of the *res* takes title to it subject to the maritime lien even without notice and who bought it in good faith for value. Characteristics of a maritime lien therefore in the Philippines are similar to that of Australia. The preferred claims are enumerated as follows:⁸⁶

1. Expenses and fees allowed and costs taxed by the court and taxes due the Government;
2. Crew’s wages;
3. General average;

⁸⁰ Arts. 646,842,608,837 and 838.

⁸¹ Hernandez, Velicaria and Hernandez, Philippine Admiralty and Maritime Law.

⁸² *PNB/NDC v. The CA, China Banking Corp.*, GR. No 128661. August 8 2000; Article 9-12 Civil Code.

⁸³ 2 Benito 381.

⁸⁴ 13 Phil 429; Article 580 provides for the list in the preference of credits but was however deemed repealed or modified by the Ship Mortgage Decree of 1978.

⁸⁵ *PNB/NDC v. CA China Banking*, GR. No 128661. August 8 2000, citing Agbayani, Commercial Laws

⁸⁶ RA 6106 and Section 2, PD 211, Section 17 of PD 1521.

4. Salvage, including contract salvage;
5. Maritime liens arising prior in time to the recording of preferred mortgage;
6. Damages arising out of tort, and
7. Preferred mortgage registered prior in time

2.3 Property to Which Maritime Liens Attaches

2.3.1 Australia

In Australia, a maritime lien with respect to a ship, other than with respect to claims for salvage, attaches only to the hull, machinery and other fixed parts.⁸⁷ For purposes of maritime liens, a “ship” includes not only the hull of a ship but also its tackle and equipment, for example its sails, rigging and fishing gear. In the absence of statutory developments, a maritime lien cannot attach to a structure which, though it may have certain features of a ship but is in fact not a ship. Accordingly, a hovercraft cannot attract a maritime lien as this is not technically a ship.⁸⁸ Same goes with dock, wharf, lighthouse, offshore oil rig or other similar structures, even though the owner or possessor of such structures maybe under a personal legal liability.⁸⁹ A maritime lien attaches to all property salvaged including floatsam, lagan and wreck. Usually a maritime lien only attracts to a particular property only like a ship or cargo, exception however is that it attracts to freight as an extension. Thus, a maritime lien on freight depends only on the existence of a maritime lien against a ship, and may attach in respect to all claims that gives rise to a maritime lien.⁹⁰

2.3.2 Philippines

In the Philippines, a maritime lien may only attach to vessels including their appurtenances and equipment.⁹¹ A vessel is defined as “every description of watercraft or other artificial contrivance use, or capable of being used, as a means of transportation on water.”⁹² The definition of vessel is broader than that of a ship in Australia. Hovercraft seems to be with in the definition and thus attract maritime lien. Under the often called the “dead ship” doctrine, a vessel that is withdrawn from navigation may

⁸⁷ Michael White, Australian Maritime Law p 32.

⁸⁸ Davies and Dickey, Shipping Law 2nd edition p104.

⁸⁹ Thomas, Maritime Liens p12.

⁹⁰ Michael White, Australian Maritime Law, p 32.

⁹¹ Hernandez, Velicaria and Hernandez, Philippine Admiralty and Maritime Law.

⁹² *M/V Marifax v. McCrory*, 391 F.2d 909 (5th Cir. 1968); said definition has already been used in number of American cases; also adopted as a definition in MARINA Memorandum Circulars in the Philippines.

not be the object of maritime lien.⁹³ A vessel consists of “the hull, engines, tackle, apparel, and furniture,⁹⁴ and a maritime lien on a vessel attaches to all of its components as well.⁹⁵ The traditional admiralty rule is that vessel itself and all equipment which is integral part of the vessel and essential to its navigation and operation,”⁹⁶ even if the said integral or component parts are owned by different parties.⁹⁷ Determination usually on what attracts maritime lien is done on a case to case basis. With respect to cargoes, unlike in Australia, it does not attract maritime liens as it is not considered as a component part of the vessel even if it is owned by the owner of the vessel. Likewise, prepaid freight does not attract maritime liens as it is also not part of the vessel.⁹⁸

2.4 Transferability

2.4.1 Australia

In Australia, as well as most commonwealth States except for bottomry bond, the nature of a maritime lien attaching to the res is a personal privilege and therefore led to the general understanding that maritime lien are not transferrable.⁹⁹ Exception however is maritime liens over crew’s wages when sanctioned by the court.¹⁰⁰

2.4.2 Philippines

In the Philippines, it is well settled that maritime liens may be assigned or subrogated as a general doctrine or to all classes. In *PNB/ NDC v CA, China Banking Corp*, the Supreme Court in affirming the CA decision, pronounced that “those who provide credit to a master of a vessel for the purpose of discharging a maritime lien also acquire a lien over the said vessel.¹⁰¹ Under American jurisprudence, “(f)urnishing money to a master in good faith to obtain repairs or supplies or to remove liens, in order to forward the voyage of the vessel, raises a lien just as though the things (for which) money was obtained to pay for had been furnished by the lender.” Likewise, “(a)dvances to discharge maritime liens create a lien on the vessel, and one advancing money to discharge a valid lien gets a lien

⁹³ This doctrine is the majority view according to Thomas Shoenbaum in Admiralty and Maritime Law, Horn book series, student edition. Referring to *Slavin v. Port Service Corp.*, 138 F.2d 386; *Hayford v. Doussony*, 32 F.2d 605 (5th Cir.1929) But see *In re The Queen, Ltd.*, 361 F. Supp. 1009, 1973 AMC 646 (E.D.Pa. 1973).

⁹⁴ *The Joseph Warner*, 32 F. Supp. 532, 533 (D. Mass.1939).

⁹⁵ *Ibid.*

⁹⁶ *Teosoro, Arrest of Vessels.*

⁹⁷ *US v. F/V Sylvester F. Whalen*, 217 F. Supp. 916 (D. Me. 1963).

⁹⁸ *Galbon Lobo Trading Co. SA v The Diponegoro*, 103 F. Supp. 452 (SD N.Y. 1951).

⁹⁹ Although there are judicial statements to the contrary, Pls. see: Derrington,, *The Law and Practice of Admiralty Matters*; DC Jackson, *Enforcements of Maritime Claims*; Thomas, *Maritime Liens* for detailed discussions.

¹⁰⁰ Derrington and Turner, *The Law and Practice of Admiralty Matters* citing *The Cornelia Henrietta* (1866) L R A & E 51; *The James Elwell* (1921) p 351 *The Leoborg* (1964).

¹⁰¹ *PNB v. China Banking, Corp.* G.R. No. 128661.

of equal dignity with the one discharged.” There is no reason why these doctrines cannot be given persuasive application in the instant case considering that they do not violate or contravene any of our existing laws. Moreover, as pointed out by the appellate court, these doctrines are in accord with our provisions on subrogation particularly Art. 1302, paragraph 2 of the New Civil Code which provides that there is legal subrogation “when a third person, not interested in the fulfillment in the obligation, pays with the express or tacit approval of the debtor.”

By definition, subrogation is the transfer of all the rights of the creditor to a third person, who substitutes him in all his rights Article 2067 of the New Civil Code provides that “(t)he guarantor who pays is subrogated by virtue thereof to all the rights which the creditor had against the debtor.”¹⁰² But persons in a position to control the vessel’s destiny-owners, part owners, general agents, and other shareholders-may not acquire a maritime lien against the vessel even by the advancement of funds.¹⁰³ From this jurisprudence, it would seem inconsistent with the Civil Code’s express provisions on the principle of subrogation. However the above-named persons may all be considered as the owner and as such there would be no inconsistency considering that an owner cannot be at the same time be subrogated to himself.

2.5 Availability of Sister Ship (Surrogate Ship) Arrest

2.5.1 Australia

In Australia, the United Kingdom, Hong Kong, New Zealand and Singapore the right to proceed *in rem* on a maritime lien is limited to the particular ship in which the lien arises,¹⁰⁴ while in South Africa this differs as it allows an action *in rem* to proceed against an associate ship in a claim arising out of a maritime lien provided that there has been no change of ownership.¹⁰⁵ The reason given in the recommendation by the Australian Law Reform Commission that arrests of surrogate ships should not be available (which was followed by the 1988 Act of Australia) is that these liens are in a form of inchoate security interest in particular property and proceeding against other property would therefore not be appropriate.¹⁰⁶ It added that the limitation would rarely cause injustice in practice as a claimant in respect to a maritime lien would usually be able to proceed against a surrogate ship pursuant to a statutory right *in rem* covering the same cause of action.¹⁰⁷

¹⁰² GR. No 128661. 8 August 2000.

¹⁰³ See: *Medina v. Marvirazon Compania Naviera. S.A.*, 533 F. Supp.1279 (D. Mass, 1982).

¹⁰⁴ Derrington and Turner, *The Law and Practice of Admiralty Matters* p 58.

¹⁰⁵ *Ibid.* Citing Admiralty Jurisdiction Regulation Act 105 of 1983, S 2(6) and (7);

¹⁰⁶ Civil Admiralty Jurisdiction (ALRC 33, 1986)p159-160, para 208.

¹⁰⁷ See: Davies and Dickies, *Shipping Law*, Second Edition.

2.5.2 Philippines

In the Philippines, similar to Australia, there is nothing in the Ship Mortgage of 1978 Decree authorizing the arrest of a sister ship with respect to claims arising from a maritime lien. Although other vessels owned by the offending party may be attached the lienor will lose its maritime lien status should the vessel be taken away from jurisdiction out of Philippine waters thereby creating injustice. Furthermore, *in rem* proceedings are only authorized on claims and necessities and preferred mortgages. To provide a sister ship arrest remedy through statute deviates from the origin or nature of a maritime lien as the same is only particular to the ship it attaches, it however is the prerogative of the State.

2.6 Maritime Liens Recognized (or other charges)

2.6.1 Australia

2.6.1.1 Damage Done by Ship

Although collision is common, it extends to other property damaged which may be of any kind, movable or immovable, afloat or on shore.¹⁰⁸ In *The Rama*, Clarke J sets the following three criteria which must be satisfied in English law for “damage done by ship” to attract a maritime lien: here as follows:

1. The damage must be the caused by something done by those in the navigation or management of ship in the physical sense;
2. The ship must be the actual or noxious instrument by which the damage is done; and
3. The damage must be sustained by a person or property external to the ship.¹⁰⁹

The term “damage” in the present context has a broad meaning. It covers both direct and consequential damage, and it covers personal injury.¹¹⁰ Damage done by ship resulting to

¹⁰⁸ Dickey and Davies Shipping Law, Second Edition

¹⁰⁹ *The Rama* (1996) 2 Lyod’s Rep 281, 293; See: Derrington & Turner for more details; See also Thomas Maritime Liens.

¹¹⁰ Dickey and Davies citing *The Theta* (1894) p 280 *The Tolten* (1946) p 135 *Nagrint V ship Regis*, formerly the ship *Rodney* (1939) 61 CLR 688 at 693-696.

physical loss of life however does not appear to attract maritime lien.¹¹¹ The basis of the maritime lien for ship damage is a negligent or otherwise wrongful act or manoeuvre for which the ship owner is liable, either directly or vicariously.¹¹² There is therefore no maritime lien where there is no negligent or wrongful act. The location where the damage occurs is generally irrelevant but more on the limits of the lien are given more consideration; The High Court of New Zealand, *In Fournier*, Fisher J made the following observations:

1. A maritime lien will normally be available where damage is caused by the crew's active operation of the ship or its gear in a manner giving rise to substantive liability;
2. The ship or gear must play a significant role in the chain of causation leading to the damage; it is insufficient that the damage could have occurred but for the existence of the ship or gear;
3. The damage in question can be injury to the person;
4. The damage can be suffered in or on a ship;
5. Members of the ship's crew qualify as eligible claimants;
6. The activity is not confined to the navigation of the ship in the usual sense but must involve the active use of the ship or its gear for one of the purposes for which they were designed or installed;
7. Because the damage must be caused by the active operation of the ship or its gear, injury suffered due to the plaintiff's encounter with the static condition does not apply;
8. For the same reason, damage caused by the action of one or more individuals on the ship does not qualify unless it was effected through the active operation of the ship or its gear.¹¹³

This is consistent with Australia's criteria for damage done by ship.¹¹⁴

2.6.1.2 Salvage

Maritime liens attaches to a salvable property when salvage services are rendered.¹¹⁵ Under the general maritime law, the elements of salvage are as follows:

¹¹¹ Derrington *The Law and Practice of Admiralty Matters* for more details p 64-68 ; there are divergence of opinion on the matter. Same goes with physical injury resulting from damage done by ship.

¹¹² Dickey and Davies, 107 The owner includes demise charter.

¹¹³ *Fournier v The Ship Margaret Z* (1999) 3 NZLR, 111, 125.

¹¹⁴ Derrington *Supra* p 63-64.

1. That the subject matter of the claim is property capable of being salvaged;
2. That the property was in danger;
3. That the salvage services were rendered voluntarily; and
4. That the salvage services were rendered successfully.¹¹⁶

Aircraft do not attract maritime liens but maybe a subject of salvage.¹¹⁷ Towage likewise does not attract maritime liens unless it is part of the salvage services.¹¹⁸

2.6.1.3 Wages

Under Section 313(I) of the Merchant Shipping Act (MSA), it is provided that wages includes emoluments'. An Emolument here is any allowance, bonus or other financial benefit that accrues to the advantage of a member of the crew of a ship as contractual recompense for services that either been rendered, or under normal circumstances would have been rendered.¹¹⁹ These include:

1. Paid leave, sick leave and bonuses;
2. Repatriation cost;
3. Union dues;
4. Damages for wrongful dismissal;
5. Damages for breach of contract by the shipowner in failing to pay employee contributions to a pension fund for the benefit of the seamen;
6. An allotted share of a crewmember's wages directed by him to his home country; and
7. Wages while on board under instruction of the owner following the arrest of the vessel.¹²⁰

In England, the term wages however does not include redundancy or severance pay. This is because such are not emoluments but are payment for losing employment.¹²¹

¹¹⁵ *The Two Friends* (1799) 1 C Rob 271.

¹¹⁶ Derrington Supra p69 refers the readers to the standard works on salvage: G Brice and JReeder, Brice on Maritime Law of Salvage (4th Edition, 2003) and F D Rose, Kennedy and Rose; The Law of Salvage 6th edition 2002 .

¹¹⁷ Civil Aviation Act 1982, s 87.

¹¹⁸ Thomas, Maritime Liens; *The Cephalonia*(1923) p 68 and 75.

¹¹⁹ *Tarcoma City* (1991) 1 Llyod's Rep p 330 at 346.

¹²⁰ Derrington Supra p 72.

Under Merchant Shipping Act 1970, s 18 it provides that “The master of a ship shall have the same lien for his remuneration[...] as a seaman has for his wages.” Unlike Seaman’s lien however it would appear that the Master’s lien is not subject to the protection of MSA 1970, S 16 (1), by which a seaman’s lien is made incapable of being renounced by agreement.¹²²

2.6.1.4 Masters Disbursements

In *Oriente*, Lord Esher observed: “The real meaning of the word “disbursement” in Admiralty practice is disbursements by the master, which he makes himself liable for in respect of necessary things for the ship, for the purpose of navigation, which he, as master of the ship, is there to carry out[...]”.¹²³ He further added that “necessary in the sense that they must be had immediately.”¹²⁴ In *Ripon City*, Gorell Barnes J. adopted a similar formulation and defined a disbursement as anything which is “necessary for the purpose of the navigation of the vessel on the service on which she was engaged.”¹²⁵ The emphasis of the law is therefore to show “immediate necessity”.

Thomas, a modern writer, describes “there is a close relationship between the relationship between a “disbursement and a necessary” for service rendered or thing supplied maybe invoked by law relating to either depending on the precise role adopted by the master. Where the master is content to defray the expense himself or incur a personal liability, such expense or liability represents a disbursement in respect of which he may claim an indemnity against the shipowner. In contrast, where the master takes the chattel or service on the credit of the shipowner the supplier must seek his remedy against the court’s jurisdiction over necessaries.”¹²⁶ The transactions maybe identical in every respect and are only differentiated by reference to whether or not the master pledges the shipowner’s credit.¹²⁷

¹²¹ *Tarcoma City* (1990) I Lloyd’s Rep 408 at 415 See also Thomas, Maritime Liens.

¹²² See: Thomas, Maritime Liens citing *William Tell* (1892) p 337.

¹²³ *Oriente* (1895) p. 49.

¹²⁴ *Ibid*

¹²⁵ *Ripon City* (1897) p 226, 234.

¹²⁶ Thomas Maritime Liens p 205.

¹²⁷ *The Oriente* (1894) P. 271.

2.6.1.5 Other Charges

“The notion of ‘other charge’ embraces charges in the nature of mortgages or those contained within shipping legislation which can be considered charge *eiusdem generis* with a maritime lien”.¹²⁸ Possessory liens not included.¹²⁹

Supply of necessaries does not give rise to maritime liens in Australian or English law. Because of this, the suppliers and service men’s position are poor as claimants and are subordinate in priority to that of mortgage.¹³⁰ This is so even where repairs increase the value of the ship.¹³¹ Although necessaries does not give rise to maritime liens, they are nevertheless enforceable by action *in rem*.¹³² The non-recognition of necessaries as a maritime lien however is one of the reasons which obviously favours the international bankers and financiers as the said charge may greatly affect the mortgagee’s security.

Towage and pilotage likewise do not attract maritime liens and are also not enforceable through action *in rem*.¹³³

2.6.2 Philippines

The Philippines have a more extensive list of maritime liens compared to Australian and the English law. Generally, the sources of maritime liens are the services rendered to a maritime res or damage done by the res. Under the Filipino laws and jurisprudence, the claims recognized as giving rise to maritime liens are -in addition to those existing in favour of the State by virtue of the privileges which are granted to it by all the laws:

1. Preferred mortgage liens;
2. Pilot, tonnage and port dues and other similar charges;
3. The wages of the crew, master’s wages and disbursements;
4. The repairs and other necessaries;

¹²⁸ Derrington, Supra p 58.

¹²⁹ *Ibid.* p 58.

¹³⁰ See: Davies and Dickey, Shipping Law p 117.

¹³¹ *Ibid.* p 117.

¹³² See: Thomas, Maritime Liens.

¹³³ See: Davies and Dickey, Shipping Law p117.

5. Damage done by a ship and/or collision liabilities;
6. Salvage;
7. Loans on bottomry and respondentia;¹³⁴
8. Use of drydocks or marine railway or other necessities furnished to the vessel.¹³⁵

As to tort, it is defined as a private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.¹³⁶ On the other hand, a quasi-delict is defined as any act or omission which causes damages to another, there being fault or negligence, and there being no pre-existing contractual relation between the parties.¹³⁷ From the above definition tort or damage done by the ship is very broad. There are however even cases where pre existing contracts do not preclude tort or quasi-delict where the latter arose from a breach.¹³⁸

Claims for collision, death, and injury are classic tort liens.¹³⁹ It would therefore seem that in the Philippines death and personal injury arising from tort, or as a result of damage done by ship, will give rise to maritime liens as well.

As for maritime lien for wages, in the *Marlita A. Misa v. NLRC, Gau Sheng Phil, Inc.*, case it was held that “under the Labor Code refer to “*remuneration or earnings*” paid by the employer for “*work done or to be done*”. In short, wages exclude benefits, the latter being more of a gratuity than remuneration for work.”¹⁴⁰ The definition likewise in for basic wages under the minimum standard contract for seamen of the Philippine Overseas Employment Authority (POEA) does not include emoluments.¹⁴¹ Unlike Australia emoluments are included as wages, in the Philippines it would appear that it is not. This is clearly detrimental to the Filipino seamen. The Philippines is a large labor exporter for seamen. It is ironic that the Philippines considers said seamen together with the other overseas worker to be the modern heroes for remitting dollars to keep the economy afloat yet offer them less protection. This is in contrast with Australia where they have less if not none and they give high

¹³⁴ Hernandez, Velicaria and Hernandez, Philippine Admiralty and Maritime Law p 203 citing *Philippine Shipping Co. & Phil.* 281, 285 citing *Madriaga, Yangco v Lasema*, 50 OG 4296, 4300; See also: Code of Commerce Arts. 646, 842, 608, 837 and 838.

¹³⁵ PD1521 otherwise known as Ship Mortgage Decree of 1978.

¹³⁶ Black’s Dictionary 5th Edition.

¹³⁷ Article 2176 Civil Code

¹³⁸ *Coca-Cola Bottlers, Philippines v CA*, G.R. No. 110295.

¹³⁹ Thomas Shoenbaum, Admiralty and Maritime Law p 264 citing *State of California v S.S Bournemouth*, 307 F. Supp. 922, 926 (C.D. Cal 1969).

¹⁴⁰ CA-GR Sp. No. 8390; See also: Article 97, Labor Code of the Philippines.

¹⁴¹ See: POEA standard Contract.

protection. Although repatriation costs is included in the seamen minimum standard contract, it would likewise seem that it does not give rise to maritime lien as it is not included in the definition.¹⁴²

As for “necessaries”, the term is broadly construed by the courts to mean any goods or services that are useful to the vessel, keep her out of danger, and enable her out of danger, and enable her to perform her particular function.”¹⁴³ The case law is clear in that “necessaries” does not mean absolutely indispensable; rather, the term refers to what is reasonably needed in the ship’s business.¹⁴⁴ Necessaries may be money, skilled labor, and personal services, as well as materials.¹⁴⁵

The requisite for necessaries to give rise to maritime lien:

1. The necessaries must have been furnished to and for the benefit of the vessel;
2. Must have been necessary for the continuation of the vessel;
3. The credit must have been extended to the vessel;
4. There must be necessity for the extension of the credit; and
5. The necessaries must be ordered by persons authorized to contract on behalf of the vessel.¹⁴⁶

2.7 Priorities of liens

2.7.1 Australia

Under the English law, priorities are not applied in a precise or straightforward manner. For this reason application is complex and difficult to determine. Public policy and equitable considerations may warrant departure from the established rules of ranking. As explained by one scholar

Rules of ranking are no more than visible manifestations of an underlying equity, policy or other consideration being displaced, either for want of substantiation or from the competitiveness of a greater equity or policy, so also the rule’ becomes inoperative or inapplicable. In the realm of priorities there would

¹⁴² See: Section 23 of POEA Standard Contract at www.POEA.gov.ph website.

¹⁴³ *Equillesse Corp. V M/V Sampson*, 793 F 2d 598, 1986 (en banc).

¹⁴⁴ *Walker-Skageth Food Stores v The Bavois*, 43 F. Supp. 109 ,110 (S.D.N.Y 1942)

¹⁴⁵ Thomas Shoenbaum p256 citing E.g *Clubb Oil Tools Inc. V M/V George Vergottis*, 460 F. Supp. 835 (S.d. Tex 1976).

¹⁴⁶ Agbayani, Commercial Laws, p 589.

appear to be no immutable rules of law, but only a number of guiding principles.¹⁴⁷

2.7.1.1 Prima Facie Ranking

Australian Courts faced with disputes as to the appropriate ranking of priorities will commence their determination with the prima facie ranking which is as follows:

1. The Admiralty Marshal's costs and expenses connected with the arrest of the vessel and its appraisal and sale;
2. (i) The costs of the arresting party up to and including the arrest of the vessel concerned;
3. (ii) The costs of the party who obtained the order for the appraisal and sale of the vessel, for the period up to and including the order itself;
4. Maritime liens;
5. Possesory Liens;
6. Mortgages;
7. Other statutory actions *in rem*;
8. In personam claims; and
9. Owner of the res.¹⁴⁸

Said Prima Facie order is likewise followed in Canada, Hong Kong and Singapore.¹⁴⁹

2.7.1.2 Maritime Liens of Different Class

In *The Lyrma*, Brandon J. has expressed the relationship between salvage and the prior liens in following terms:

It has been long an established principle that maritime lien on a ship for salvage has priority over all other liens which have attached before the salvage services were rendered. The basis for the principle is an equitable one, namely that

¹⁴⁷ Thomas, *Maritime Liens* (1980), p 243-235. See also: *Steam Fisher* (1926) p73 - 82; See also: *The Ruta* (2000) 1 WLR 2068, 2075.

¹⁴⁸ Derrington and Turner *The Law and Practice of Admiralty Matters* p 186 citing *Patrick Stevedores No. 2 Pty Ltd v The MV Skulptor Konenkov* (1997) 144 ALR 394 (Federal Court of Australia)

¹⁴⁹ See: Derrington p 186 citing as basis for the principle *The Aline, The Benares, The Chimera and the Duna*

salvage service concerned has preserved the property to which the earlier liens have attached [...]¹⁵⁰

The damage lien is given high priority as a matter of public policy to encourage safe navigation.¹⁵¹ Usually rank behind salvage lien and may take priority over a wages lien. The presumption that damage lien takes priority over wages lien may be displaced where:

1. The wages' claimants have no alternative remedy;
2. The damage lien would exhaust the fund; and
3. The damage lien is attributable to the negligence of the crew.¹⁵²

In *The Veritas* case¹⁵³ damage lien took priority over prior voluntary liens such as salvage on the basis that person having the right arising *ex contractu* has chosen to enter voluntarily into the relationship unlike in the case of liens arising from *ex delicto*. Wages liens are for the protection of the seamen as a matter of public policy and are usually subordinate to both salvage and damage lien. In *The Ruta*,¹⁵⁴ the principle of equity was applied giving priority to wages over the damage lien. The case also contradicted the principle on the preference of *ex delicto* over *ex contractu*, as pronounced by David L. Steel:

The contrast between voluntary nature of the wages lien and involuntary nature of the damage lien might afford some justification for giving priority to the damage lien. But the contrast would, on its face of it, be more significant in resolving the ranking between a damage lien and earlier salvage lien. Once engaged, the seaman has no option but to continue to volunteer his services.¹⁵⁵

Generally master's disbursements are treated similarly with wages both being *ex contractu*.

2.7.1.3 Maritime Liens of the Same Class

¹⁵⁰ No.2) (1978) 2 Lloyd's Rep. 30.

¹⁵¹ *The Ruta* (2000) 1 WLR 2068, 2076, (2001) 1 All ER 450, 458,(2000).

¹⁵² See: Derrington Supra, p 193.

¹⁵³ *Veritas* (1901) (1901) p 304.

¹⁵⁴ *The Ruta* (2000) 1 WLR 2068, 2076, (2001).

¹⁵⁵ *Ibid.*

Maritime liens for ship damages ranks *pari passu* (equal footing) as between themselves regardless of the date of attachment.¹⁵⁶

As to maritime liens against a ship for salvage, the “inverse priority rule” applies, that is subsequent salvage liens prevails over the prior salvage liens.¹⁵⁷ Such rules applies only where the salvage operations give rise to maritime lien were made on different occasions. But where the salvage maritime lien arose because of a conjoint salvage with a common aim of salvaging the endangered vessel, the priority rank is *pari passu*.¹⁵⁸

As to the wages, the priority is rank *pari passu* when there exist numerous wages lien. The distinction between the master’s wages and the crew has been erased as the crew no longer received its claim from the master.¹⁵⁹

2.7.1.4 Maritime Liens as Against Other Charges

Maritime liens always take priority over mortgages whether established prior or later in time¹⁶⁰

The priority between maritime lien and possessory lien depends on date of the attachment, the prior one prevails over the subsequent one.¹⁶¹ The possessory lien even takes priority over mortgage even if the latter is executed prior to the possession.¹⁶²

2.7.2 Philippines

As already mentioned above, the preference of payment or priority are as follows:

1. Expenses and fees allowed and cost taxed by the Government;
2. Crew’s wages;
3. General Average;
4. Salvage, including contract salvage;

¹⁵⁶ *The Steam Fisher* (1927) p 73 esp at 76-77, 86-87.

¹⁵⁷ *The Veritas* (1901) p 304.

¹⁵⁸ Thomas, Maritime Liens, p 224 citing *Russland* (1924) p 55.

¹⁵⁹ *The Royal Wells* (1985) QB p 86 at 92.

¹⁶⁰ *The Ripon City* (1897) P226 at 224; *Currie M’Knight* (1897) AC p97 at 105; *The Tolten* (1946) p 135 at 150; *Halcyon Isle* (1981) AC 2211 at 233, 244, 246.

¹⁶¹ See: Davies and Dickey p 119 citing *The Gustaf* (1862) *Lush* 506 to 507 ; 167 ER 230 at 231; *The Tergeste* (1903) p26 at 33-34. See also: *Russland* (1924) p 55 at 59.

¹⁶² See: Derrington Supra, p 199; *Tergeste* (1903) p 26.

5. Maritime liens arising prior in time to the recording of a preferred mortgage;
6. Damages arising out of tort; and
7. Preferred mortgage prior in time.¹⁶³

If proceeds of the sale should not be enough to pay all the credits included in one number or grade, the residue shall be divided pro rata. (in proportion to ones claim)¹⁶⁴

2.8 Conflicts of Law

2.8.1 Australia

In *Morelines Maritime Agency Ltd v Skulptor Vuchetich*,¹⁶⁵ Australia accepted and followed the decision in *The Halcyon Isle*¹⁶⁶ where a majority of the Privy Council accepted maritime liens as procedural and remedial in nature. Consequently, maritime lien's existence should be determined by English law as *lex fori*.¹⁶⁷ Under this, the court will not recognise a foreign act or event as giving rise to maritime lien even though it would have been recognised in the jurisdiction where it occurred. It is as if the occurrence of those events happened within the territorial jurisdiction of the English Courts.¹⁶⁸ Courts will however give foreign claims a status of a maritime lien when it falls as such under the English law even if said claims are not recognized by the other jurisdictions to be giving rise to maritime liens. This conflict rule under *Halcyon Isle* has likewise been followed by New Zealand,¹⁶⁹ South Africa¹⁷⁰ and Singapore.¹⁷¹

2.8.2 Philippines

In the Philippines, it adopted US jurisprudence on the principles of conflict of law rules in maritime lien recognition because as earlier mentioned the Ship mortgage Decree was patterned closely

¹⁶³ PD1521.Sec. 17 (a).

¹⁶⁴ PD1521.Sec. 17(b).

¹⁶⁵ (1996) 62 FCR 602.

¹⁶⁶ *Bankers Trust International Ltd v Toddshipyards Corp* (1981) AC221.

¹⁶⁷ Questioned by Jackson see: *Enforcement of Maritime Claims*, 2nd ed LLP 1996 referring the minority view of Lord Salmon and Scarman substantially that the inchoate character is misleading and that although the maritime lien may not be perfected until the enforcement through action in rem, it is substantive in nature and an encumbrance on the ship; See: rebuttal by Lord Salmon and Scarman at 247B-D, LIP, 1996.

¹⁶⁸ *The Colorado* (1923) P 102; *Halcyon Isle* (1981) AC221.

¹⁶⁹ *The Ship Bett Ott v General Bills Ltd* (1992) 1NZLR 655.

¹⁷⁰ Derrington & Turner, *The Law and Practice of Admiralty Matters* citing *Transol BV v MV Adrico Unity* 1989 (4) SA 325; *Bady Hamilton Stevedore Co v. MV Kalantiao*.

¹⁷¹ *The Ocean Jade* (1991) 1 SLR 583; *The Andres Bonifacio* (1993) 3 SLR 521.

to the Ship Mortgage Act of 1920 which is part of the Federal Maritime Act. In *Crescent*,¹⁷² the Philippine Supreme Court cited the various tests used in the U.S. to determine whether a maritime lien exists are the following:

1. multiple-contact test to determine, in the absence of a specific Congressional directive as to the statute's reach, which jurisdiction's law should be applied. The following factors were considered: (a) place of the wrongful act; (b) law of the flag; (c) allegiance or domicile of the injured; (d) allegiance of the defendant shipowner; (e) place of contract; (f) inaccessibility of foreign forum; and (g) law of the forum.¹⁷³

2 The factors provided in Restatement (Second) of Conflicts of Law, especially in resolving cases brought under the Federal Maritime Lien Act. Their application suggests that in the absence of an effective choice of law by the parties, the forum contacts to be considered include: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.¹⁷⁴

In *Gulf Trading and Transportation Co. v. The Vessel Hoegh Shield*,¹⁷⁵ The court however pronounced that:

The U.S. Court of Appeals recognized the modern approach to maritime conflict of law problems introduced in the Lauritzen case which is the multiple contact test. However, it observed that Lauritzen involved a torts claim under the Jones Act while the present claim involves an alleged maritime lien arising from unpaid supplies. It made a disclaimer that its conclusion is limited to the unique circumstances surrounding a maritime lien as well as the statutory directives found in the Maritime Lien Statute and that the initial choice of law determination is significantly affected by the statutory policies surrounding a maritime lien. It ruled that the facts in the case call for the application of the Restatement (Second) of Conflicts of Law. The U.S. Court gave much significance to the congressional intent in enacting the Maritime Lien Statute to

¹⁷² *Crescent Petroleum, Ltd. V M/V " Lok Maheshwari," The Shipping Corporation of India, and Portserv Limited and/or Transmar Shipping, Inc.*, G.R. No. 155014 at <http://www.supremecourt.gov.ph/jurisprudence/2005/nov2005/155014.htm>.

¹⁷³ See: Lauritzen, 633 F. Supp. 74 (1985); *Rhoditis* case, U.S. 306, 1970 AMC 994 (1970) and *Romero case* 358 U.S. 354, 1959 AMC 832 (1959).

¹⁷⁴ *Gulf Trading and Transportation Co. v. The Vessel Hoegh Shield*, 658 F.2d 363 (1981).

¹⁷⁵ *Ibid.*

protect the interests of American supplier of goods, services or necessities by making maritime liens available where traditional services are routinely rendered. In the maritime realm, it is expected that when necessities are furnished to a vessel in an American port by an American supplier, the American Lien Statute will apply to protect that supplier regardless of the place where the contract was formed or the nationality of the vessel.

The United States Courts also apply the doctrine of *forum non conveniens* to allow dismissal of an enforcement claim of a maritime lien, but only if it is shown that there exist a more convenient alternative forum exist.¹⁷⁶

This conflict of rule accommodates foreign maritime lien which is the situation sought to be prevented as already mentioned. The remedy for such a situation, but at the same time retaining the application of conflict of law rule, is to provide a provision to the effect that maritime liens recognized should only be those similar or substantially similar to that of the Philippines. Although, some authors commented that the non recognition of foreign maritime liens is tantamount to denial of substantive rights as it appears to be enforceable through out the world, and also a deviation from the nature of maritime lien particularly that maritime liens follow the vessel to which it attached, the non-recognition however is justified in the pursuit of the objective which is to provide favourable financing climate to investors which is also the prerogative of a State. Moreover, other States also does not recognize foreign maritime liens.

2.8.3 Other Jurisdictions

In Canada, maritime lien are considered to be a substantive right or a proprietary character and not merely procedural, as such courts applied *lex causae* in the determination of the existence of maritime lien but the question of priority accorded to the claim is determined by *lex fori*.¹⁷⁷ The problem with this conflict rule is that the country following the same will be forced to recognize the existence of maritime lien like for example lien on necessities including repairs which is the problem sought to be prevented as it is one of the reasons why financiers or investors are reluctant to finance as the same may burdenly affect the mortgage security.

¹⁷⁶ Compare *Perez Y. Compania (Cataluna) SA v. Triton Pacific Maritime Corp.*, 647 F. Supp. 556 (S.D. Tex., 1986).

¹⁷⁷ See: *Todd Shipyards Corp v Altema Compania Maritima SA* (1973) 32 DLR (3d) 572 (known as *Ioannis Daskalelis*); *Metaxas v Ship The Galaxias* (1989) 1 FC 386.

In China, the conflict of law rule governing maritime liens is the law of the place hearing the case.¹⁷⁸ In other words, *lex fori* similar to that of Australia.

2.8.4 Liens as They Relate to Mortgages

2.8.4.1 Australia

Under Admiralty Act 1988, it is provided to the effect that the mortgagee shall be the owner of the ship mortgaged to the extent of making said ship available for the payment of his claim.¹⁷⁹ Although there are other consequences of this provisions, one effect as decided in a case was that the mortgagee may opposed other claims in court to defend his interest over the mortgaged property.¹⁸⁰ This remedy available to the mortgagee is another feature strengthening the security of the mortgagee as he will be able to oppose those unwarranted claims which might affect his interest.

2.8.4.2 Philippines

Unlike Australia, mortgage creditors are not allowed to oppose claims by other maritime holders. The reason advance by the Supreme Court to the effect that because although the rights of the Mortgagee may be adversely affected by the other claims, the damage caused to him is indirect and therefore he is not the real party in interest. As such, he cannot oppose. It further explained that to allow this would be expensive and time consuming.¹⁸¹ This is prejudicial to the interest of the mortgagee. This however would make sense to claim cases involving seaman as the cost of litigation and may frustrate his claim considering that generally they don't have much money. The best remedy to facilitate the disposition of cases and to allow the mortgagee to oppose is to create an admiralty court like most countries do.

¹⁷⁸ Jimmy and Sik Kwan Tai, *The Different Approaches to Recent Developments in Chinese and US Ship Arrest Laws*, EJCL Vol.9.3 October 2005 p 8.

¹⁷⁹ Sec. 40.

¹⁸⁰ See: Davies and Dickey 2nd edition at mortgages.

¹⁸¹ *In the Kodolo case*, G.R. 34087.

Conclusion

After analyzing the 1993 Convention on Maritime Liens and Mortgages and comparing the Philippine and Australia's legal system on the subject matter, it can be readily seen that the Philippine's system accords lesser security to mortgage creditors as compared to both. Since a favourable financing climate is important for the development of the Philippine merchant fleet, amendments or revision to the current law should therefore be made giving effect to those provisions which are sound under the Convention. This approach would allow for the Philippines to align its legal system with certain provisions of the Convention without ratifying thereby being bound by the less desirable provisions. Likewise, revisions should take into consideration the advantages of the Australian's system particularly with respect to the conflicts of law where Australia does not recognize foreign maritime liens.

In the interest of promoting the maritime industry, the Maritime Industry Authority should propose to the legislative department amendments or revision of the present regime to include:

1. Adoption of the recognized maritime liens as well as the order of priority as provided in the 1993 Convention except for claims of ports, waterway and other similar charges, and the inclusion of tax due to the Government as a maritime lien and given the number one priority. The adoption favors the improvement of financial climate because the Convention recognize lesser number of maritime liens as compared to that of the Philippines which affects the security of the mortgage creditor and thus minimize creditors reluctance to provide loans for ship acquisition. The recognition and priority accorded to tax lien however is justified to ensure collection thereof as tax is the lifeblood of the Government. Although exclusion of ports, waterways and other similar charges is a deviation from the Convention, most States no longer recognize the same and it is also justified to pursue the objective of promoting a favourable climate to investors. Those not recognized should also be excluded except maritime liens for necessities which should be given a status of other maritime lien consistent with the Convention as the same does not affect the mortgage creditor. Contract salvage should also be included in the same category as salvage, as both encourage salvage of vessels which preserves the vessel and in turn benefits the other security holders.

2. The constitution of a new mortgage under the second part of Section 19 (c) of the Ship Mortgage Decree of 1978 as discussed in Subsection 1.4.2 above should be deleted so as not to compel mortgage creditors to constitute a new mortgage with the buyer at forced sale who the creditor has no prior relationship and who may be a bad debtor; as this puts the creditor in a bad position.

3. As discussed under Section 1.6 above, a provision to the effect that: Until an international registry is created, maritime liens can only be enforced against the vendor owner, operator or charterer or manager of the vessel and not to the buyer in good faith unless said maritime liens are registered to eliminate the problems of prospective buyer answering for claims against the vendor of a vessel in which he has nothing to do with the transaction in the first place.

4. A provision to the effect that the mortgagee will be allowed to oppose claims to protect its interest notwithstanding its indirect possible damage except over claims made by seafarers. This is to afford more protection to the mortgage creditors as his claim may be affected by other claims which are accorded more priority as discussed under sub-section 1.5.1. The exception with respect to seafarers is because they usually receive relatively less compensation and opposition to their social claims in a litigation will cause delay and might frustrate said claims.

5. Like most States, the Philippines would benefit from the creation of an Admiralty Court to facilitate speedy disposition of cases and integrate admiralty cases including seamen's wages.

6. To retain the existing choice of law conflict rules but giving emphasis on the recognition of maritime liens that are only similar or substantially similar to that of the Philippines, notwithstanding the initial choice of law made so as not to recognize liens that are not justified which may impair the rights of the mortgage creditors.

7. Between the holder of a possessory lien and a mortgagee, priority must be given to the one whose claim was attached first. Both should however be subordinate to maritime liens. Disclosure statement should be retained. This eliminates the fraudulent practice of the shipowner and repairer increasing the repair price as opposed to the actual cost of the repair and later on claiming ahead of the mortgage creditor in the proceeds of the vessel in a forced sale if given more priority.

8. Authorizing surrogate vessel arrest as a remedy available to the maritime lien holder to provide alternative security to the maritime lien holders in cases where the vessel is taken out of jurisdiction.

9. To give effect of law to all the other provisions of the Convention not inconsistent with the above.

10. To include emoluments under the scope of wages similar to the British definition of wages to afford more protection to the seamen to secure not only the basic wage. This is for social justice reasons.

The aforementioned amendments will improve the overall Philippine law on maritime liens and ship mortgages and align the said law with international practice. This gives more attraction to both local and foreign investors as more protection is given and it is more understandable to the international community. This favourable financing condition leads to the development of the nation's merchant fleet which in turn promotes the seaworthiness of the vessels and also the economy.

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Appendix 1 The Status of the 1993 Convention

Participant	Signature	Definitive signature (s), Ratification, Acceptance (A), Approval (AA), Accession (a)
Brazil	28 Mar 1994	
China	18 Aug 1994	
Denmark	9 Aug 1994	
Ecuador		16 Mar 2004 a
Estonia		7 Feb 2003 a
Finland	29 Aug 1994	
Germany	11 Jul 1994	
Guinea	18 Nov 1993	
Monaco		28 Mar 1995 a
Morocco	23 Aug 1994	
Nigeria		5 Mar 2004 a
Norway	31 Aug 1994	
Paraguay	24 May 1994	
Peru		23 Mar 2007 a
Russian Federation		4 Mar 1999 a
Saint Vincent and the Grenadines		11 Mar 1997 a
Spain		7 Jun 2002 a
Sweden	2 Jun 1994	
Syrian Arab Republic		8 Oct 2003 a
Tunisia	24 Nov 1993	2 Feb 1995
Ukraine		27 Feb 2003 a
Vanuatu		10 Aug 1999 a

Source: UNCTAD.org. click at <http://r0.unctad.org/tfl/tfl-docs-legal.htm>. As of January 2008.